GEORGE A. RILEY (S.B. No. 118304)
SANDEEP N. SOLANKI (S.B. No. 244005)
VIVI T. LEE (S.B. No. 247513)
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, California 94111-3828
Telephone: (415) 984-8700
Facsimile: (415) 984-8701
E-Mail: griley@omm.com
ssolanki@omm.com
vlee@omm.com

Attorneys for Defendant APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE APPLE INC. SECURITIES LITIGATION	Case No. C06-05208-JF
	CLASS ACTION
THIS DOCUMENT RELATES TO: ALL ACTIONS	**APPLE INC.'S REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION**

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	ADDITIONAL FACTUAL BACKGROUND	1
	A. The Notice Program	2
	B. CAFA Notice	3
	C. Requests for Exclusion	4
	D. Objections	4
III.	THE SETTLEMENT AND PLAN OF ALLOCATION SHOULD BE APPROVED	5
	A. Mr. Frank's Objection To The Plan Of Allocation And The Notice Is Unavailing	6
	1. The Proposed Donation Of Unclaimed Funds Complies With Applicable Precedent	6
	2. Mr. Frank's Objection That Current Shareholders' Holdings Will Be Unfairly Diluted If Any Funds Are Donated Is Frivolous	10
	3. The Contents Of The Notice Comply With Applicable Law	10
	B. The Orloffs' Objection Has No Merit	11
	C. Dr. Sibley's Objection To The Notice Program Is Unfounded	12
	D. Mr. Fekrat's Objections Are Inconsistent With The Operative Complaint And Federal Securities Law	14
IV.	CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Class Plaintiffs v. City of Seattle,
955 F.2d 1268 (9th Cir. 1992) 5

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005) 8, 9, 15

Fidel v. Farley,
534 F.3d 508 (6th Cir. 2008) 14

In re Critical Path Sec. Litig.,
No. C 01-00551 WHA, 2002 WL 32627559 (N.D. Cal. June 18, 2002) 15

In re Intelligroup Sec. Litig.,
468 F. Supp. 2d 670 (D.N.J. 2006) 9

In re Magma Design Automation, Inc. Sec. Litig.,
No. C-05-2394 CRB, slip op. (N.D. Cal. Mar. 27, 2009) 10

In re Paracelsus Corp. Sec. Litig.,
No. Civ.A. H-96-3464, 2007 WL 433281 (S.D. Tex. Feb. 6, 2007) 10, 12

In re Pharm. Indus. AWP Litig.,
588 F.3d 24 (1st Cir. 2009) 7

In re Portal Software, Inc. Sec. Litig.,
No. C-03-5138 VRW, 2007 WL 4171201 (N.D. Cal. Nov. 26, 2007) 6

In re Rambus Inc. Sec. Litig.,
No. C-06-4346 JF, slip op. (N.D. Cal. May 14, 2008) 10

In re UnitedHealth Group Inc. PSLRA Litig.,
643 F. Supp. 2d 1094 (D. Minn. 2009) 11

Masters v. Wilhelmina Model Agency, Inc.,
473 F.3d 423 (2d Cir. 2007) 9

N.Y.C. Employees' Ret. Sys. v. Jobs,
593 F.3d 1018 (9th Cir. 2010) 11

Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.,
688 F.2d 615 (9th Cir. 1982) 5

Silber v. Mabon,
18 F.3d 1449 (9th Cir. 1994) 13, 14

Torrisi v. Tucson Elec. Power Co.,
8 F.3d 1370 (9th Cir. 1993) 13, 14

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

15 U.S.C. § 77z-11(a)(7)(B) 10
15 U.S.C. § 78u-4(a)(7)(B)(i) 11
15 U.S.C. § 78u-4(a)(7)(B)(ii) 11
15 U.S.C. § 78u-4(e)(1) 8
28 U.S.C. § 1713 10
28 U.S.C. § 1715 3

I. INTRODUCTION

The Settlement was reached after years of hard-fought litigation, including complex motion practice, an appeal to the Ninth Circuit, and extensive negotiations. The Settlement provides substantial and immediate benefits for the Class: a $16.5 million Settlement Fund and a series of significant corporate governance reforms. The costs of administering and distributing the Net Settlement Fund and the attorneys' fees and costs award will not reduce the funds available to the Class because Apple has agreed to pay those amounts separately. The Plan of Allocation provides for distribution of the Net Settlement Fund based on the maximum possible recovery—up to $1.70 per share—available under federal securities law if plaintiffs could overcome several major barriers and prevail at trial. If funds remain after two distribution rounds, the balance will be donated to nine university programs specializing in corporate governance. The Settlement and Plan of Allocation clearly satisfy the prerequisites for final approval.

The Claims Administrator has complied in all respects with the Court-approved notice program and has publicized the Settlement in the national media and on the internet and distributed over 1.2 million copies of the Notice to potential Class Members by mail. As a result, over 18,000 Proofs of Claims have been submitted. Six weeks remain until the March 15, 2011 claim submission deadline, and Apple expects a significant number of individual and institutional investors and nominees will submit additional claims.

Only a handful of exclusion requests have been submitted, and none indicates that the Settlement is unfair or improper. No institutional investor has objected to the Settlement or requested exclusion. Only four objections have been received and, as demonstrated below, none has merit. Accordingly, Apple respectfully requests the Court grant final approval.

II. ADDITIONAL FACTUAL BACKGROUND

Apple provided a summary of the relevant facts, procedural history, and settlement terms in its opening briefs in support of preliminary and final approval. (Apple Mem. ISO Prelim. Approval at 3:8-12:13; Apple Mem. ISO Final Approval at 4:5-8:3.) Apple focuses below on the implementation of the notice program and the response of Class Members.

A. The Notice Program

The Claims Administrator has given notice to more than 1.2 million potential Class Members it could reasonably identify. (Supplemental Decl. of Claims Administrator ("Epiq Decl.")[1] ¶ 11.) As directed by the Court's Amended Preliminary Approval Order, the notice program started on December 8, 2010, with the publication of the Publication Notice in *Investor's Business Daily*, a business paper with national readership, and over *Business Wire*. (*Id.* ¶ 18.) As a result, the Publication Notice was picked up by several other news and media outlets. The Claims Administrator also mailed the Notice to 31,886 record holders based on information obtained from Apple's transfer agent. (*Id.* ¶ 4.)

On December 9, 2010, the Claims Administrator contacted 5,804 bankers, brokers and other nominees (collectively, "nominees") that may hold shares for potential Class Members. (*Id.* ¶ 4.) The mailing to these nominees included a cover letter stating:

> The Court has directed that WITHIN FOURTEEN (14) DAYS OF YOUR RECEIPT OF THIS NOTICE you either: (a) Provide the Claims Administrator the name and last known address of beneficial owners of Apple Inc. common stock; or (b) Forward copies of the attached Notice and Proof of Claim to beneficial owners of Apple Inc. common stock."

(*Id.*, Attachment B.) The Claims Administrator also emailed the Notice and cover letter to nominees for which it had email addresses. (*Id.* ¶ 4.) In response, nominees have sent the Claims Administrator: (1) lists of potential Class Members; (2) pre-printed address labels for potential Class Members; and (3) requests for quantities of unaddressed notices to forward to potential Class Members. (*Id.* ¶ 5.) The Claims Administrator promptly fulfilled requests from nominees as they were received. As of January 14, 2011, the Claims Administrator had distributed more than 1.1 million copies of the Notice. (*Id.* ¶ 11.)[2]

Some nominees submitted requests to the Claims Administrator after the Court-imposed fourteen-day deadline. Nevertheless, the Claims Administrator fulfilled those requests in an

[1] The Epiq Decl. is Exhibit A to Lead Plaintiff's reply brief in support of final approval.

[2] Some copies of the Notice were returned as undeliverable. The Claims Administrator attempted to re-mail the Notice to a different address if possible, but about 42,000 records remain undeliverable. (Epiq Decl. ¶ 11.)

expeditious manner. (*Id.* ¶¶ 7-8.) As permitted under the Amended Preliminary Approval Order, nominees also have made copies of the Notice and mailed it directly to their clients. The Claims Administrator has received invoices from nominees for such mailings. (*Id.* ¶ 10.)

The Notice provides information about (i) the Settlement, (ii) how Class Members can qualify for a payment and how much their payment may be, (iii) Plaintiffs' Lead Counsel's fee petition, and (iv) how and when to object to the Settlement or request exclusion from the Class. The Publication Notice summarized the Settlement and the key deadlines.

The Notice and Publication Notice refer Class Members to a website and toll-free number for additional information. The toll-free number has been accessed by more than 2,300 callers since it began on December 8, 2010. (*Id.* ¶ 13.) The website, which also went live on December 8, 2010, has had over 12,000 user sessions. (*Id.* ¶ 17.) The website has information and documents relating to the Settlement, including the Stipulation, the Notice, and briefs in support of final approval. As disclosed in the Notice (§ 29), the Claims Administrator posted Plaintiffs' Lead Counsel's fee petition shortly after it was filed. (Epiq Decl. ¶ 17.)

The deadline for submitting Proofs of Claim is March 15, 2011. As of February 3, 2011, over 18,000 paper and electronic claims have been filed by or on behalf of Class Members who purportedly purchased over 547 million shares of Apple stock. (*Id.* ¶ 20.) As a point of reference, approximately 700 to 840 million shares (split-adjusted) of Apple stock were outstanding during the nearly five-year Class Period. The Claims Administrator has begun to process the claims and follow up with Class Members regarding deficiencies. (*Id.* ¶ 23.) The Claims Administrator has been advised by several nominees that they intend to file claims on behalf of their clients before the March 15, 2011 deadline. (*Id.* ¶ 12.) Apple expects a significant number of additional claims will be filed by individual and institutional shareholders.

B. CAFA Notice

The Class Action Fairness Act ("CAFA") requires defendants to notify the U.S. Attorney General and all state attorneys general of a proposed class action settlement. *See* 28 U.S.C. § 1715. Although the legislative history and statutory language suggest CAFA may not apply to securities class actions, Defendants nevertheless provided the notice on October 4, 2010, and

distributed copies of relevant settlement documents. (Declaration of Vivi Lee ISO Apple's Reply ISO Final Approval ("Lee Decl.") ¶ 2, Ex. A.) On November 23, 2010, Defendants provided supplemental notice enclosing copies of the Stipulation and Amended Preliminary Approval Order. (*Id.* ¶ 3, Ex. B.) As of February 4, 2011, Apple has received no objections to the Settlement from the U.S. Attorney General or any state attorney general. (*Id.* ¶ 4.)

C. Requests for Exclusion

The deadline for submitting requests for exclusion from the Class was January 21, 2011. Nineteen exclusion requests were submitted, all from individual shareholders. (Epiq Decl. ¶ 19.) Seven individuals did not identify the number of shares they purchased during the Class Period; one individual stated she did not purchase any shares. (*Id.*) The ***total*** number of shares purchased by individuals requesting exclusion is 3,425 shares. (*Id.*) None of the individuals requesting exclusion indicated that they believe the Settlement is unfair or improper. One individual excluded herself because she earned significant returns on Apple stock. (*Id.*, Ex. I.)

D. Objections

The deadline for filing objections to the Settlement was January 21, 2011. Objections were submitted by four individual shareholders.[3] No institutional investors filed objections. The objections are summarized below in the order in which they are discussed in Section III below:

- On January 21, 2011, Theodore Frank of the Center for Class Action Fairness, counsel for putative Class Member Patrick Pezzati, renewed the objection to the Plan of Allocation's *cy pres* component that he made at the preliminary approval stage. Mr. Frank also objected to the content of the Notice and Plaintiffs' Lead Counsel's fee petition. Mr. Pezzati purportedly purchased 100 shares during the Class Period. Mr. Frank seeks attorneys' fees and indicates he will appear at the Settlement Fairness Hearing.

[3] In addition to the four objections discussed below, the parties received correspondence about the Settlement from Charles Kyriazos and Winston Gouzoules. (Lee Decl., Exs. F, G.) Mr. Kyriazos requests exclusion from the Class but also objects to the "lawsuit." Mr. Kyriazos states that he does not "believe any of the alleged actions by the Defendants harmed any member of the class" and "would be in favor of barring or limiting attorneys [sic] fees and a recovery for this action." (*Id.*, Ex. F.) Mr. Gouzoules does not appear to be objecting to the Settlement or requesting exclusion. He states that nothing "should be paid to the claimants" because "the company has done nothing wrong" and shareholders earned significant returns. (*Id.*, Ex. G.)

- On January 20, 2011, Drs. Marshall and Ann Orloff filed an objection to the Settlement, Plan of Allocation, and Plaintiffs' Lead Counsel's fee petition. The Orloffs do not indicate the number of shares they purchased during the Class Period or the date(s) of purchase. The Orloffs state that they will appear at the Settlement Fairness Hearing. (Lee Decl., Ex. H.)

- On January 22, 2011, Dr. George Sibley, on behalf of the Sibley Family Trust (the "Trust"), filed an objection on the ground that he did not have sufficient time to review the Settlement, Plan of Allocation, or Plaintiffs' Lead Counsel's fee petition. Dr. Sibley does not indicate the number of shares purchased by the Trust during the Class Period or the date(s) of purchase. Dr. Sibley states that he or his counsel, Gary Sibley, will appear at the Settlement Fairness Hearing. He reserves the right to seek fees and expenses.

- On January 17, 2011, Fred Fekrat filed an objection to the Plan of Allocation. Mr. Fekrat purportedly purchased 200 shares during the Class Period. If his objections are sustained, Mr. Fekrat requests that Plaintiffs' Counsel not recover any fees and expenses.

III. THE SETTLEMENT AND PLAN OF ALLOCATION SHOULD BE APPROVED

A class action settlement should be approved if the court reaches a "reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982); *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992) ("fair, reasonable, and adequate" standard also governs review of proposed plan of allocation). As Apple demonstrated in its opening brief, the Settlement satisfies this standard and should be approved. (Apple Mem. ISO Final Approval at 8:4-18:5.)

The Settlement has received overwhelming support from Class Members. Notice was given to more than 1.2 million potential Class Members and over 18,000 of them have filed Proofs of Claim. Apple expects a significant number of Proofs of Claim will be filed by nominees and individual and institutional shareholders before the March 15, 2011 deadline. Only nineteen individual shareholders who purchased a total of 3,425 shares submitted exclusion requests. None of those shareholders indicated the Settlement is unfair or improper. Only four

objections have been submitted, but as discussed below, they are meritless and should not preclude final approval. *See In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *4 (N.D. Cal. Nov. 26, 2007) (citing cases in which class settlements were approved over limited objections and opt outs).[4]

A. Mr. Frank's Objection To The Plan Of Allocation And The Notice Is Unavailing.

Mr. Frank does not object to the fairness or adequacy of the Settlement. Nor does he object to the Plan of Allocation to the extent the entire Net Settlement Fund is distributed to Class Members. (1/21/11 Frank Obj. at 2:1-2.) He asserts that the Plan of Allocation should not be approved until the Court knows how much of the Settlement Fund is distributed to Class Members and remains to be donated to the university programs. (*Id*. at 2:2-9.) Anticipating that Mr. Frank might object to the *cy pres* provision, Apple addressed this issue in its opening brief. (Apple Mem. ISO Final Approval at 18:11-21:18.) Mr. Frank nevertheless repeats the same arguments he made at the preliminary approval stage, ignoring the Plan of Allocation and the Court's prior ruling against him. (11/22/10 Order re Amended Motion for Preliminarily Approval of Settlement at 1:23-25.) Mr. Frank also contends that any donation of unclaimed funds unfairly dilutes current shareholders' holdings. (1/21/11 Frank Obj. at 6:11-7:6.) Finally, Mr. Frank states that the Notice is defective because it does not state the average per share recovery if plaintiffs prevail at trial. (*Id*. at 8:1-7.) None of these objections has merit.

1. The Proposed Donation Of Unclaimed Funds Complies With Applicable Precedent.

Mr. Frank acknowledges that several courts have approved plans of allocation providing for the distribution of unclaimed funds to charitable organizations. He asserts that those authorities are not "persuasive" because they do not apply the American Law Institute's *Principles of the Law of Aggregate Litigation* ("ALI Principles"). (1/21/11 Frank Obj. at 5:18-

[4] Apple takes no position at this time on the objections to Plaintiffs' Lead Counsel's fee petition or Mr. Frank's and Dr. Sibley's fee requests. Apple reserves the right to respond and object to any order requiring it to pay Attorneys' Fees and Expenses in excess of $2.45 million, the amount agreed upon in the Stipulation. (Stipulation § 9.1.)

6:4.) The ALI Principles are guidelines issued by a private organization and are not binding on this Court. *In re Pharm. Indus. AWP Litig.*, 588 F.3d 24, 35 (1st Cir. 2009). Mr. Frank has not identified a single case in which a court has applied the ALI Principles in lieu of binding circuit precedent or persuasive district court authorities.

The Plan of Allocation, moreover, is consistent with the ALI Principles. As Apple explained in its opening brief, there will be two distribution rounds to the Class before any funds may be donated. (Apple Mem. ISO Final Approval at 16:18-18:5, 18:26-20:8.) If a sufficient number of Class Members submit valid claims—as Apple expects and as the Court recognized at the preliminary approval stage—any *cy pres* distribution is likely to be small. (11/22/10 Order re Amended Motion for Preliminary Approval of Settlement at 1:23-25.) If funds remain after the Claims Administrator has made two attempts to pay Class Members' claims, the balance will be donated to nine university programs specializing in the types of corporate governance issues raised in this case. The ALI Principles permit this form of *cy pres* distribution.

Mr. Frank also contends that the Plan of Allocation does not adequately compensate Class Members because it limits recovery to $1.70 per share—the difference between the closing price of Apple stock on June 29, 2006 ($58.97) and June 30, 2006 ($57.27). (1/21/11 Frank Obj. at 6:4-10.) But he fails to address the multiple and significant barriers to recovery discussed in Apple's opening brief. Plaintiffs' claims are time barred because they rely on stock option grants and alleged misstatements made beyond the five-year period of repose governing securities fraud actions. (Apple Mem. ISO Final Approval at 9:3-10:4.) Plaintiffs also have not pled with particularity that Apple's disclosures regarding specific stock option grants were false or misleading or material. (*Id*.) Nor can plaintiffs satisfy their burden to plead and prove loss causation because investors did not suffer loss when Apple restated its financial statements on December 29, 2006; Apple's stock price increased by nearly $4 that day. (*Id*. at 10:5-11:1.) Plaintiffs allege shareholders suffered economic loss after Apple's June 29, 2006 press release regarding the commencement of an independent investigation of past stock option grants. But the June 29 press release did not correct, in any manner, any allegedly false statements on which plaintiffs base their claims. (*Id*. at 11:2-7.) The change in Apple's stock price after the June 29

statement, moreover, was within the normal range of volatility for Apple stock and tracked the decline of other major technology stocks that day. (*Id*. at 11:2-12:9.)

Any damages award will be limited significantly—if not entirely—by federal securities law, as plaintiffs admitted at the outset of the case. (*Id*. at 4:16-21, 12:10-14:1.) Under the PSLRA, only shareholders who purchased shares above the mean trading price of Apple stock in the ninety days following an alleged corrective disclosure are eligible for recovery. 15 U.S.C. § 78u-4(e)(1). If, as Apple contends, the corrective disclosure occurred on December 29, 2006, when Apple restated its financial statements, ***no Class Member*** could recover damages because Apple's shares never traded above the relevant mean trading (or "look-back") price ($88.30) during the Class Period. (Apple Mem. ISO Final Approval at 12:10-28.) The result is not materially different if one assumes, contrary to law, the corrective disclosure occurred on June 29, 2006, when Apple announced the investigation, because Apple's shares rarely traded above the relevant look-back price ($65.71) during the Class Period. (*Id*. at 13:1-18.) Additionally, only those Class Members who purchased shares on those limited days ***and*** held their shares until the end of the class period would be eligible for recovery. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005). These limitations would preclude the vast majority of Class Members from recovering damages if plaintiffs could survive the challenges discussed above and prevail at trial.

Plaintiffs do allege in the Corrected First Amended Consolidated Complaint ("FACC") that Apple's stock price declined by $8.30 between June 29, 2006 and July 14, 2006 because of "the Company's disclosure of 'irregularities' in its accounting for stock options." (FACC ¶¶ 460-61.) But neither the facts nor the law supports the use of a two-week period to calculate damages in a securities fraud action. There was only one relevant disclosure during that period: Apple's June 29 statement regarding the independent investigation. Although Apple's stock price declined with the prices of other technology companies on June 30, 2006, it ***increased*** by 1.2 percent on the next trading day, July 3, 2006. Apple's stock price also increased for eight straight trading days after July 14, 2006. Further, plaintiffs admit Apple's stock price was declining in the weeks before the June 29, 2006 press release and the stock prices of several major technology stocks declined after June 29, 2006. (FACC ¶¶ 459, 462.) In light of these

facts, the FACC cannot be reasonably read as seeking damages of $10 per share.

It also is well-established in an efficient market that material information is reflected in a company's stock price immediately, not over the course of two weeks. *See In re Intelligroup Sec. Litig*., 468 F. Supp. 2d 670, 696 (D.N.J. 2006). The efficient market principle is particularly appropriate here given the extent to which Apple—one of the world's largest companies—is covered in the media. Rumors and information about Apple's products, sales estimates, earnings, and management are reported in newspapers, magazines, and online news sites on a daily, even hourly, basis. Had investors reacted negatively to Apple's June 29 press release, any such reaction would have been immediate—not spread out over the course of two weeks.

The single case cited by Mr. Frank, *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), is inapposite. (1/21/11 Frank Obj. at 4:14-18.) In *Masters*, the plaintiffs asserted class claims under the Clayton Act, which provides for actual and treble damages. The parties settled the action and allocated the settlement fund based solely on class members' actual damages. *Id*. at 428. The parties' settlement agreement granted authority to the district court to determine how any unclaimed funds should be allocated. *Id*. at 432. The district court, believing it was bound by the parties' agreement, determined that unclaimed funds should be donated to charity. *Id*. The Second Circuit reversed. The court did not hold that the donation of unclaimed funds was improper. *Id*. at 435-36. Instead, the Second Circuit held that the district court should have considered whether to allocate unclaimed funds to class members as treble damages because that form of recovery was available under the Clayton Act. *See id*. at 436.

There is no basis to allocate more than $1.70 per share in funds to Class Members in this case. That amount, in fact, is extremely generous because it assumes—contrary to the facts—that the drop in Apple's stock price was caused entirely by the June 29 press release and not other factors, such as general economic conditions or other concerns about Apple's business. *Dura*, 544 U.S. at 342-43 (to prove loss causation, plaintiff must disaggregate "tangle of factors affecting price," such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, or other events"). Thus, the Plan of Allocation reasonably allocates funds to Class Members based on the maximum potential recovery under federal

securities law and should be approved.

2. Mr. Frank's Objection That Current Shareholders' Holdings Will Be Unfairly Diluted If Any Funds Are Donated Is Frivolous.

Mr. Frank contends that Class Members who are current shareholders may be injured if any settlement funds are donated to the designated university programs. (1/21/11 Frank Obj. at 6:13-19.) These potential donations, Mr. Frank claims, will "deplete[]" the value of current shareholders' holdings. (*Id.*) Mr. Frank's objection is frivolous.

Mr. Frank presents his objection as one of "first impression," admitting that no court has ever accepted his argument. (*Id.* at 7:3-6.) Mr. Frank does not even attempt to address the many decisions Apple cited approving donations of unclaimed funds in securities class actions. *See, e.g., In re Magma Design Automation, Inc. Sec. Litig.*, No. C-05-2394 CRB, slip op. (N.D. Cal. Mar. 27, 2009); *In re Rambus Inc. Sec. Litig.*, No. C-06-4346 JF, slip op. (N.D. Cal. May 14, 2008); *In re Paracelsus Corp. Sec. Litig.*, No. Civ.A. H-96-3464, 2007 WL 433281 (S.D. Tex. Feb. 6, 2007). Nor does Mr. Frank explain how donations from the Net Settlement Fund could have a material impact on the value of Class Members' holdings. The ***entire*** Settlement Fund represents 0.005% of Apple's market capitalization (over $310 billion) and 0.067% of Apple's holdings of cash and short-term marketable securities (over $25 billion). There has been no indication that the Settlement has affected Apple's stock price. Indeed, since the Settlement was first announced on September 28, 2010, Apple's stock price has increased by nearly 20 percent.

The only authority Mr. Frank cites, 28 U.S.C. § 1713, is irrelevant. That provision relates to settlements in which a "class member is obligated to pay sums to class counsel that would result in a net loss to the class member." 28 U.S.C. § 1713. Apple has agreed to pay separately the attorneys' fees and expenses award and thus, no Class Members will suffer a "net loss."

3. The Contents Of The Notice Comply With Applicable Law.

Mr. Frank asserts the Notice is defective because it does not state "the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim." (1/21/11 Frank Obj. at 8:1-4 (citing 15 U.S.C. § 77z-1(a)(7)(B)).) The provision he cites, however, governs actions asserting claims under the Securities Act of 1933. The claims in this case were

brought under the Securities Exchange Act of 1934 ("Exchange Act"). The notice provision governing Exchange Act claims states that the parties must disclose the average amount of recoverable damages per share ***only if they agree on that amount***. 15 U.S.C. § 78u-4(a)(7)(B)(i). If the parties do not agree, they must disclose their disagreement in the notice. 15 U.S.C. § 78u-4(a)(7)(B)(ii). The parties complied with the latter provision: the Notice states "[t]he parties disagree on both liability and damages and the average amount of damages that would be recoverable if Plaintiffs prevailed." (Notice § 2.)

B. The Orloffs' Objection Has No Merit.

The Orloffs contend that (i) the Settlement does not remedy the alleged "20% dilution" of their shareholdings and "loss of . . . voting privileges," and (ii) the corporate governance measures and donation of unclaimed funds do not benefit Class Members. (Lee Decl., Ex. H at 1.) To the extent donations are made, the Orloffs request the Court add two universities near their residence in San Diego. (*Id.*) The Orloffs' objection should be overruled.[5]

First, the Court already rejected plaintiffs' claims based on the alleged dilution of shareholder interests, and the Ninth Circuit affirmed that judgment. *N.Y.C. Employees' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1024 (9th Cir. 2010) ("dilution theory of economic loss is unsupported in caselaw"). The Ninth Circuit granted plaintiffs an opportunity to re-plead their Section 10(b) claim. As Apple showed in its opening brief and above, however, the Section 10(b) claim is likely to be dismissed on multiple grounds. Even if the claim survived summary judgment, plaintiffs face additional and substantial challenges to prove recoverable damages. Thus, the $16.5 million Settlement represents a substantial recovery.

Second, courts have recognized that class action settlements which include remedial measures and donations of unclaimed funds to research or educational institutions can benefit the class. In *In re UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1104 (D. Minn. 2009), for example, the court held that the corporate governance reforms proposed in a securities class action settlement provided "substantial" benefits to the class. Similarly, in this case, Apple

[5] The Orloffs' objection is defective because it fails to specify the number of shares purchased and sold during the Class Period, as required by the Amended Preliminary Approval Order.

has agreed to implement or extend significant corporate governance measures relating to, among other things, (i) insider trading, (ii) "clawback" of executive grants, (iii) granting, dating, and vesting of stock options, and (iv) preparation, approval, and maintenance of the minutes of Board and Board committee meetings. (Stipulation § 2.1 & Exs. C-K.) Moreover, in *In re Paracelsus Corp. Securities Litigation*, 2007 WL 433281, at *1-2, the court held that the donation of unclaimed funds to an organization focused on "corporate governance and investors' rights . . . may indirectly and prospectively benefit the class members in the aggregate." The nine university programs designated to receive unclaimed funds in this case also focus on governance matters and shareholder rights, and their efforts will indirectly benefit the Class.

Finally, the Orloffs provide no support for their claim that the selection of the corporate governance programs was improper. (Lee Decl., Ex. H at 1.) The nine programs were selected because of their reputations as leading corporate governance research institutions and their locations throughout the United States. There is no basis for adding more programs.

C. Dr. Sibley's Objection To The Notice Program Is Unfounded.

Dr. Sibley contends he did not have adequate time to review the Settlement, the Plan of Allocation, or Plaintiffs' Lead Counsel's fee petition because he received the Notice on January 21, 2011, the deadline for filing an objection or requesting exclusion. (1/22/11 Sibley Obj. at 1.) Upon receipt of Dr. Sibley's correspondence on January 22, 2011, Apple's counsel sent his attorney that day the relevant Settlement documents and fee petition and referred him to the settlement website and toll-free number. (Lee Decl., ¶ 5 & Ex. C.) On January 27, 2011, Apple's counsel provided Dr. Sibley's attorney with a summary of the notice program and a timeline of circumstances of the mailing to Dr. Sibley. (*Id.*, ¶ 6 & Ex. D.) Dr. Sibley has not supplemented his objection after reviewing these materials. Moreover, as discussed below, the facts show that any delay in Dr. Sibley's receipt of the Notice was caused by his broker's failure to comply with Court-imposed deadlines, not by any lapses by the Claims Administrator or the parties. Accordingly, Dr. Sibley's objection should be rejected.[6]

[6] Because it does not specify the number of shares purchased and sold during the Class Period, as required by the Amended Preliminary Approval Order, Dr. Sibley's objection is defective.

Courts have recognized that claims administrators in securities class actions must rely on nominees to notify potential class members because securities are typically held by nominees instead of beneficial owners. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993); *Silber v. Mabon*, 18 F.3d 1449, 1452 (9th Cir. 1994). Accordingly, on December 9, 2010, the Claims Administrator contacted 5,804 nominees and advised them of their obligation under the Amended Preliminary Approval Order to (i) forward the Notice directly to Class Members or (ii) provide a list of names or pre-printed labels to the Claims Administrator. The Claims Administrator informed nominees they had fourteen days to comply with this directive. Many nominees responded in a timely manner and their requests were processed promptly. Some nominees, however, did not comply with the fourteen-day deadline. One such nominee, Broadridge, requested unaddressed copies of the Notice on behalf of Merrill Lynch on January 5, 2011. (Epiq Decl. ¶ 7.) According to the Claims Administrator, Broadridge was responsible for mailing the Notice to Dr. Sibley. (*Id.* ¶ 9.) Although Broadridge's January 5 request was after the Court-imposed deadline, the Claims Administrator sent Broadridge unaddressed copies of the Notice by overnight mail on January 10 and 11, 2011. (*Id.* ¶ 7.) Broadridge informed the Claims Administrator that it mailed the Notice to Dr. Sibley on January 14, 2011. (*Id.* ¶¶ 7, 9.) Thus, the Claims Administrator complied in all respect with the Court-approved notice program.

The facts demonstrate that Dr. Sibley's experience was not widespread. The parties are aware of only two other shareholders who claim to have received the Notice on or shortly before January 21, 2011. As with Dr. Sibley, the Claims Administrator determined that any delay in the receipt of those two mailings was because of a nominee's failure to comply with the Court's fourteen-day deadline. (*Id.* ¶ 9.) In an abundance of caution, however, the parties requested that the Claims Administrator inform Class Members who inquire about the January 21, 2011 deadline that they may submit late objections or exclusion requests for the Court's consideration. (Lee Decl., ¶ 7 & Ex. E.) This should resolve Dr. Sibley's concerns.

Even if a greater number of Class Members received the Notice late because of their brokers' failure to act within Court-imposed deadlines, it should not compromise final approval of the Settlement. The relevant issue in determining the adequacy of notice in a class action

settlement "is not whether some individual shareholders got adequate notice, but whether the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement." *Torrisi*, 8 F.3d at 1375. As the Sixth Circuit explained in *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008), "in each case in which a court has confronted this issue, notice provided to the class members' nominees—*i.e.*, the brokerage houses—has been deemed sufficient even if brokerage houses failed to timely forward the notice to the beneficial owners." *See also Silber*, 18 F.3d at 1452-54 (claims administrator provided "best notice practicable" through direct mailings to record owners and by contacting brokerage houses, even though objecting class member received notice "well after the opt out deadline").

As explained in Section II above, the Claims Administrator made reasonable efforts to give notice to potential Class Members through a national publication, a national wire service, direct mailings, a website and toll-free number, and by contacting nominees. As a result, over 18,000 Proofs of Claim have been filed to date, with six weeks remaining before the March 15, 2011 claim submission deadline. Accordingly, the notice program approved by the Court and implemented by the Claims Administrator was the best notice practicable under the circumstances and satisfies all statutory and due process requirements.

D. Mr. Fekrat's Objections Are Inconsistent With The Operative Complaint And Federal Securities Law.

Mr. Fekrat contends that the following categories of investors should be eligible to recover under the Plan of Allocation but are not: (1) investors who engaged in options transactions; and (2) investors who traded Apple stock but did not hold any shares at the end of the Class Period. (1/17/11 Fekrat Obj. at 1.) Neither objection is well-founded.

The Plan of Allocation was structured to reflect plaintiffs' allegations in accordance with federal securities law. The FACC alleges only that Apple common stockholders were damaged because of disclosures "of 'irregularities' in [Apple's] accounting for stock options." (FACC ¶¶ 460-61, 466.) The FACC nowhere alleges that investors who traded in Apple option contracts were damaged. Such claims are beyond the scope of the case and were properly excluded. *See In re Critical Path Sec. Litig.*, No. C 01-00551 WHA, 2002 WL 32627559, at *5 (N.D. Cal. June 18,

2002) (exclusion of investors who traded option contracts was appropriate because operative complaint did not mention options). Moreover, Apple did not issue any call or put options during the Class Period, other than stock options to employees. All such employees have been excluded from the Class. (Notice § 15.)

Investors who sold all their shares before the end of the Class Period also were properly excluded. In *Dura*, the Supreme Court held that investors who sell their shares before an alleged corrective disclosure do not suffer a loss because "the inflated purchase payment is offset by ownership of a share that ***at that instant*** possesses equivalent value." 544 U.S. at 342 (emphasis in original). The parties in this case reasonably limited recovery to Class Members who held shares until the end of the Class Period.

IV. CONCLUSION

The Class has shown its overwhelming support for the Settlement. Although the Notice and Publication Notice were disseminated to more than 1.2 million potential Class Members, the parties received only nineteen requests for exclusions and four objections. Neither the exclusion requests nor the objections demonstrate that the Settlement is unfair, unreasonable or inadequate in any respect. Accordingly, the Court should approve the Settlement and Plan of Allocation.

Dated: February 4, 2011

O'MELVENY & MYERS LLP

By: */s/ George A. Riley*
George A. Riley

Attorneys for Defendant
APPLE INC.